Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

IN RE: THEODORE B. GOULD,

Petitioner,

On Petition For A Writ Of Mandamus
To The United States Court Of Appeals
For The Eleventh Circuit,
Circuit Judge Rosemary Barkett
Circuit Judge Stanley F. Birch, Jr.
Circuit Judge Joel F. Dubina

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

1. The briefs in opposition filed on behalf of the respondents Bank of New York ("Bank") and Fred Stanton Smith, as trustee of the Miami Center Liquidating Trust ("trustee")[1] do not provide a justification for the failure to issue a petition for a writ of mandamus to compel the United States Court of Appeals for the Eleventh Circuit to exercise its jurisdiction to determine whether the Bank is *not* entitled to a Trustee's Certificate under the Second Amendment to the Bank's plan, because the Bank, and its attorneys, engaged in fraud and intentional misrepresentation in obtaining the judgment confirming the Bank's plan and have continued to engage in misconduct without abatement.

The evidentiary support of the incontrovertible facts showing the fraudulent conduct of the Bank, and its attorneys, are as follows:

• The Bank *subordinated* its liens to the rights of the Miami Center Joint Venture ("MCJV"); see Petition at 4, n. 6, quoting district court's opinion quieting MCJV's title to the leased furniture, fixtures, and equipment ("FF&E").

• The appraised fair market value of the FF&E, which the trustee transferred to M C Holdings Partners, the Bank's alter-ego as the Miami Center's buyer, had a replacement cost of *$13,500,000.00; see,* Petition at 21, quoting Failla, the Bank's appraiser.

• The Miami Center's net sale proceeds paid to the trustee on October 10, 1985, were *$1,162,394.95; see* Petition at 13, n. 22, and 20, quoting trustee's testimony.

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[1] The Solicitor General has not filed a brief on behalf of the United States Court of Appeals for the Eleventh Circuit and the constitutional questions concerning the reliance of judges on a common law mootness doctrine, held applicable in bankruptcy proceedings, for the failure to exercise jurisdiction, without statutory authority, to hear a substantial controversy of parties having adverse legal interests, justifies the issuance of an order instructing the Solicitor General to brief the issue.

• The Bank took credits of *$247,873,972.35* against the Miami Center's purchase price of $255,600,000.00, and established an escrow for disputed real estate taxes plus interest of *$7,006,114.65*, *see* Petition at 7.

• The Closing Statement for the trustee's sale of the Miami Center, which was drafted by the Bank's attorneys, had an abatement provision for missing chattels, and the Bank claimed that "[t]here was $4,659,709 worth of missing items," *see* Petition at 20, quoting trustee's testimony, for which the trustee granted the Bank a credit of *$442,000*, Petition at 21.

• The Miami Center's Closing Statement provided for the Bank to take a credit against the sale proceeds, in an amount at least *$13,130,082.27* in excess of the debt due under the loan documents, *see* Petition at 8, n. 12.

The arithmetic of the Bank's fraud is simple, and the Bank's reliance on this Court's "reluctance to disturb findings of fact concurred in by two lower courts," Bank's Answer at 9, is misplaced, because *either* the Miami Center's buyer did not pay for the purchase of MCJV's FF&E *or* the Bank took MCJV's money as a credit against the Miami Center's purchase price on October 10, 1985, in violation of MCJV's *superior* contractual priority with the Bank.

The evidentiary support for the allegations that the trustee's conduct was a breach of fiduciary duty and that the trustee conspired with the Bank is also incontrovertible and based on the following facts:

• The trustee *failed* to pay MCJV for the FF&E's purchase in accordance with the provisions of the Bank's plan, *see* Petition at 4, quoting Art. IV, *Means For Execution Of The Plan*.

• The trustee *failed* to seek the Court's instructions concerning various postconfirmation modifications of the Bank's plan, *see* Petition at 7-8, and difficult questions of judgment prior to the commencement of distribution under the plan's provisions in reliance on the Bank's indemnification holding him harmless for his actions

under the plan's provisions and execution of the Contract of Sale, *see* Petition at 6, n. 10.

• The trustee *conspired* with the Bank's attorneys to cause the plan's substantial consummation and dismissal as moot of the debtors' appeal of the bankruptcy court's order confirming the Bank's amended plan under the common law mootness doctrine applicable in the Eleventh Circuit that a court lacks authority to provide meaningful relief for a substantially consummated plan, *see* Petition at 30, citing the testimony of the trustee's former attorney.[2]

• The trustee has consented to the imposition of *$15,269,243* in accrued interest from October 10, 1985 through April 5, 1994, under the Trustee's Certificate issued to the Bank to limit the damages for negligent

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[2] Irving M. Wolff, the trustee's former attorney, has testified:

> Q. Did the Bank of New York want the Trustee to commence distribution [under] the provisions of its plan for the purpose of being placed in the position of being able to cause the dismissal of the Debtors' appeal of the confirmation order?
>
> A. They urged . . . we had a strategy session. And the lawyers that were present, I think it was Ziegler, Vance Salter . . . [and] we decided that one of the ways to facilitate confirmation or consummation would be to make a payment to the Class 6 creditors. Everybody agreed that they would waive their rights to object to that. The purpose would be to create the arguments of mootness.
>
> Mr. Smith made the distribution. . . . And it was on that basis of that distribution that two things occurred:
>
> One, the Debtors' objection to confirmation was in fact dismissed because of mootness. . . .
>
> And the other problem that the Bank had was to dismiss the RICO suit. And the first thing we did was to dismiss the RICO suit.

misrepresentation for which the Bank is liable as the plan's proponent in accordance with *Smith v. Bank of New York*, 161 B.R. 302, 306 (Bkrtcy. S.D. Fla. 1993), and after the Bank agreed to a judgment of *$15,000,000*, the trustee paid *$3,999,999.71* to the Bank. Thereafter, the Bank has filed pleadings alleging that an additional *$11,200,000* remains unpaid under the Trustee's Certificate.[3]

• As of February 28, 1991, the trustee had paid administrative expenses of *$7,628,039.64*,[4] plus interest, as fees for attorneys, accountants, consultants, and fiduciary fees.

2. The trustee's reliance on the district court's opinion, cited as *In re Holywell Corp.*, 59 B.R. 340 (S.D. Fla. 1986), Trustee's Brief at 5-6, is not a legal contention that is warranted by existing precedent. The district court's opinion was *vacated*, see *Miami Center Limited Partnership v. Bank of New York*, 838 F.2d 1547, 1558 (11th Cir. 1988), and a vacated judgment is *not* binding precedent, see *Deakins v. Monoghan*, 484 U.S. 193, 200 (1988) ("When a claim is rendered moot while awaiting review. . . . This disposition strips the decision below of its binding effect.")

The "law of the case" in this proceeding is the Eleventh Circuit's opinion, cited as *In re Holywell Corp.*, 913

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[3] It is undisputed that the funds transferred to the trustee on October 11, 1985, were adequate to pay *all* the claims of the creditors against the various bankrutpcy estates and to pay for the purchase of MCJV's FF&E, *see* Petition at 8, and because the trustee failed to pay MCJV in accordance with the provisions of the Bank's plan, and M C Holdings Partners paid *$22,335,882.13* to MCJV on March 18, 1991, *see* Petition at 16, the bankruptcy court authorized the issuance of a Trustee's Certificate to the Bank, in the amount of *$22,128,484.05* as of February 6, 1991. The judgment against the Bank for negligent misrepresentation and the trustee's payment represent *$18,999,999.71* and an outstanding balance due of *$3,128,484.34* plus interest.

[4] As of October 31, 1997, the trustee had paid *$9,657,430.13* in adminstrative expenses, an additional *$2,029,390.48*.

F.2d 873 (11th Cir. 1990), affirming the district court's *reversal* of the order confirming the Bank's amended plan with respect to MCJV's claims, 913 F.2d at 878, on the grounds that the Bank's plan did *not* comply with the applicable provisions of title 11, namely, section 1122, 913 F.2d at 879-880, and, thus, as a matter of law, the Second Amendment to the Bank's plan did not satisfy 11 U.S.C. § 1127, see App. 57; also, Petition at 27.

3. The respondents do not provide a justification for the failure to issue a petition for writ of mandamus to vacate the judgment of the Eleventh Circuit Court of Appeals, because Circuit Judge Barkett had been disqualified from these proceedings in accordance with 28 U.S.C. § 455(a) and participated in the issuance of a judgment dismissing *sua sponte* for lack of jurisdiction of an appeal of the district court's judgment, affirming the bankruptcy court's conclusion of law that the doctrines of *res judicata* and collateral estoppel barred relitigation of the allegation that "the Bank should not recover . . . under the Second Amendment to the Plan, because . . . 'The Bank of New York, and its attorneys, have engaged in a pattern of fraud'," *see* Petition at 17.

In *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988), this Court held:

> We conclude that in determining whether a judgment should be vacated for a violation of § 455(a), it is appropriate to consider the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process. We must continuously bear in mind that "to perform its high function in the best way 'justice must satisfy the appearance of justice.' " *In re Murchison*, 349 U.S. 133, 136 (1955) (citation omitted) 486 U.S. at 864.

These proceedings have been characterized by pervasive personal bias, *see* Petition at 10, n. 17, in which attorneys and accountants appointed by the courts of the

Southern District of Florida have been rewarded with the payment of excessive fees for carrying out an unlawful plan and punished for expressing the opinion that the plan should not have been confirmed, *see* Petition at 10-11.[5]

In this case, the evidence that the Bank, and its attorneys, have engaged in a pattern of fraud to obtain a judgment, authorizing the issuance of a Trustee's Certificate to the Bank under the Second Amendment to the Bank's plan, has been proven and the injustice of the issuance of a Trustee's Certificate to the Bank is clear, 1 *supra*. Judge Barkett's participation in the issuance of the Eleventh Circuit's judgment raises reasonable questions concerning the panel's impartiality.

4. The respondents do not provide a justification for the failure to issue a petition for writ of mandamus to vacate a judgment of the Eleventh Circuit Court of Appeals that is a usurpation of power based on a mootness doctrine which relies on (a) the creation of an unjustifiable federal common law rule, in violation of the separation of powers, and (b) represents a conflict with the constitutional doctrine that a case is only moot if "[t]he controversy between the parties has . . . clearly ceased to be 'definite and concrete' and no longer touch[es] the legal relations of parties having adverse legal interests." *DeFunis v. Odegaard*, 416 U.S. 312, 317 (1973).

(a) Section 7 of Article I of the Constitution specifies the procedures to create a law and the fundamental principle of the separation of powers in the constitutional arrangement for the political institutions in the United

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[5] The bankruptcy court also denied Arnold and Porter's application for the payment of attorneys' fees and expenses as an administrative expense of the Miami Center Liquidating Trust, on the grounds that filing a petition for writ of certiorari, which resulted in this Court's *Holywell* opinion, was a breech of the fiduciary duty imposed on the debtors under the Bankruptcy Code.

States was explained by James Madison in *The Federalist Papers*, No. 47, quoting Montesquieu: "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator." The creation of a federal common law, that is, the judicial creation of a federal rule of decision without statutory authority, is an unconstitutional usurpation of powers, *see Atherton v. F.D.I.C.*, ___ U.S. ___, 117 S.Ct. 666 (1997), citing *O'Melveny & Meyers v. F.D.I.C.*, 512 U.S. 79, 97, 114 S.Ct. 2048, 2055 (1994), quoting *Wheeldin v. Wheeler*, 373 U.S. 647, 651, 33 S.Ct. 1441, 1445 (1963) ("[C]ases in which judicial creation of a special federal rule would be justified . . . are . . . 'few and restricted'."). There is no statutory authority for the Eleventh Circuit's *Miami Center* mootness doctrine, *see* Petition at 12, quoting *Miami Center Limited Partnership v. Bank of New York*, 838 F.2d 1547, 1554 (11th Cir. 1988), and there is no federal policy or interest in granting a judge the authority to dismiss an appeal as moot of a cause, alleging fraud, breach of fiduciary duty, and conspiracy. The rights at issue are not public rights, see *Northern Pipeline Const. v. Marathon Pipe Line Co.*, 102 S.Ct. 2858, 2871 (1982).

"Federal courts . . . are courts of limited jurisdiction that have not been vested with open-ended law-making powers," *O'Melveny*, 512 U.S. at 90 (Stevens, J., concurring), quoting *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 95 (1981), in which this Court held "we consistently have emphasized that the federal lawmaking power is vested in the legislative, not the judicial, branch of government; therefore federal common law is 'subject to the paramount authority of Congress'." (Citation omitted)

(b) This Court has specified the established practice of vacating a judgment below and remanding with the direction to dismiss cases which have become moot pending appellate review:

> . . . clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented

> through happenstance. When that procedure is followed, the rights of all parties are preserved; none is prejudiced by a decision which in the statutory scheme was only preliminary. *United States v. Munsingwear*, 340 U.S. 36, 39 (1950).

This Court also held, citing Scott, *Collateral Estoppel by Judgment*, 56 Harv.L.Rev. 1, *Restatement*, Judgments, Section 69(2) that "[w]here a party to a judgment cannot obtain the decision of an appellate court because the matter determined against him is immaterial or moot, the judgment is not conclusive against him in a subsequent action on a different cause of action."

The question of whether the Bank is entitled to a Trustee's Certificate under the Second Amendment to the Bank's plan is a live issue which supplies the constitutional requirement of a case or controversy in accordance with *Powell v. McCormack*, 395 U.S. 487, 496 (1969), because the Bank's plan wrongfully subordinated the valid claims of insiders with an equity interest, 913 F.2d at 880, the issuance of the judgment authorizing the Trustee's Certificate was based on the fraudulent conduct of the Bank, and its attorneys, 1 *supra*, with whom the trustee conspired, 3 *supra*, and the dictum is *not* binding in the Eleventh Circuit's *Miami Center* mootness ruling that "the bank would then have paid twice for the same assets [and] it was given a trustee's certificate enforceable against assets of the estate to protect it from double payment," 838 F.2d at 1556. See *McDaniel v. Sanders*, 452 U.S. 130, 141 (1981).

(c) The opinions in these proceedings represent a lack of scholarship in which the judges of the court of appeals have misconstrued the mootness provisions of the Bankruptcy Code with the doctrine of finality provided in 11 U.S.C. § 1141(a) that "the provisions of a confirmed plan bind the debtor . . . any entity acquiring property under the plan, and any creditor . . . or general partner of the debtor . . . whether or not such creditor, equity security holder, or general partner has accepted

the plan." In *Stoll v. Gottlieb*, 305 U.S. 165 (1938), this Court held:

> We see no reason why a court, *in the absence of an allegation of fraud in obtaining the judgment* (emphasis added) should examine again the question whether the court (footnote omitted) making the earlier determination on an actual contest over jurisdiction between the parties, did have jurisdiction of the subject matter of the litigation. 305 U.S. at 172.

This case is based on the allegation that the Bank, and its attorneys, engaged in fraud to obtain a judgment authorizing the issuance of a Trustee's Certificate to the Bank under the Second Amendment to the Bank's plan, which was confirmed without satisfying the procedural requirements of the Bankruptcy Code, and this Court has held, in *Chambers v. NASCO, Inc.*, 111 S.Ct. 2123 (1991), that all federal courts possess an inherent power that, *inter alia*,

> allows a federal court to vacate its own judgment upon proof that a fraud has been perpetrated upon the court. This "historic power of equity to set aside fraudulently begotten judgments," *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 245 (1944), is necessary to the integrity of the courts, for "tampering with the administration of justice in [this] manner . . . involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public." *Id.* at 246.

111 S.Ct. at 2132. While Congress has determined that a court may not "revoke" an order of confirmation for fraud after 180 days have elapsed, 11 U.S.C. § 1144, the inherent power provides substantial alternatives to revocation, including relief against the Bank as the plan's proponent pursuant to its indemnification for the trustee's actions under its provisions and execution of the Contract of Sale, for which a different bankruptcy judge also held the Bank liable, because

> In this case, there is no dispute that the bank failed to include any analysis of the tax consequences of the proposed reorganization scheme in its disclosure statement or any provision for payment of taxes in the plan. The law requires an analysis of the tax consequences and provision for payment. See 11 U.S.C. § 1129(d) (citations omitted). The failure to do so is an omission of material fact. . . . As such, the bank's representations concerning the feasibility of the plan . . . were materially false. 161 B.R. at 307.

For the foregoing reasons, and for the reasons stated in the petition, the petition for writ of mandamus should be granted.

Respectfully submitted,

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